In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1350

JOE A. TRUJILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of having "knowingly received, concealed and facilitated the transportation" of 209 kilograms of illegally imported marijuana with knowledge that this marijuana had been illegally imported into the United States, in violation of 21 U.S.C. 176a. On May 13, 1968, he was sentenced to the minimum mandatory term of five years' imprisonment (Tr. 236,

256-258, 267-268).[1] The court of appeals affirmed, *per curiam*, without writing an opinion.

The facts are not in dispute. In relevant part, they show that on the evening of January 25, 1968, narcotics agent Canaday, pretending to be in the market for a large quantity of marijuana for resale in New York, met with petitioner and others in a bowling alley in East Los Angeles. The agent provided identification, and advised petitioner that he had $13,000 with which to make a purchase (Tr. 68-69). Petitioner told the agent that he was "lucky" since he was getting "the last 200 kilogram bricks" of some 800 bricks which petitioner had originally had on hand. Petitioner said that "he was a very reputable dealer in marijuana" and "that he obtained his marijuana directly from Mexico" (Tr. 70). Petitioner then took an informant, working in an undercover capacity, to a nearby automobile which contained the marijuana. After being apprised that the marijuana had been located, other agents, who had kept the transaction under surveillance, placed petitioner and his confederates under arrest (Tr. 87-91, 103-107, 116, 129).

1. The sole claim raised in the petition is that petitioner, if he declared the marijuana as required by 21 U.S.C. 176a, would have incriminated himself under other laws regulating the marijuana traffic and that therefore his conviction cannot stand under the principles of *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v.

[1] "Tr." refers to the two-volume, consecutively paginated trial transcript which we are filing herewith.

United States, 390 U.S. 85.[2] The short answer is that petitioner was charged and convicted under the "transportation" and "concealment" provisions of Section 176a, and not under the "smuggling" or "illegal importation" language.[3] His criminal responsibility did not turn upon his failure to declare or invoice the marijuana; it resulted from the fact that he dealt with marijuana in this country knowing that it had been illegally imported. In short, compliance with the portion of the statute under which petitioner was convicted did not require him to make any disclosure at all, much less one that might incriminate him; the statute simply required that petitioner avoid any

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[2] We assume that petitioner would rely also upon *Leary* v. *United States*, No. 65, 1968 Term, decided May 19, 1969, approximately two weeks after the petition in this case was filed.

[3] 21 U.S.C. 176a provides in pertinent part:

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned * * *.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

knowing involvement with illegally imported marijuana.

2. At no stage of the proceedings—neither at trial, nor on appeal, nor in the instant petition—has there been any challenge to the fact that the district court instructed the jury in terms of the statutory inference contained in 21 U.S.C. 176a (see Tr. 238-240). We of course recognize that, under this Court's decision in *Leary*, the "knowledge" aspect of the Section 176a presumption is constitutionally infirm as applied to the ordinary user. In light of the evidence in this case, however, it is our view that the conviction should not be reversed because the jury was instructed in terms of the presumption. Petitioner, a large dealer himself, expressly told the agent that he obtained his marijuana directly from Mexico. This statement is corroborated not only by the quantity involved but by the fact that the marijuana was "compressed into distinctive 'brick'" (see *Leary, supra*, slip op. 42-43). Moreover, the finding in *Leary* that the "knowledge" aspect of the presumption had no rational foundation in current experience was made in the context of what the smoker or ultimate consumer of the marijuana could be assumed to know, and not what a large-scale supplier like petitioner might know as to the source of his marijuana. Under the circumstances, where petitioner expressly admitted that the marijuana involved in fact came from Mexico, and has never challenged the validity of the instruction, the error may properly be deemed harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18. See *Harrington*

v. *California*, No. 750, 1968 Term (decided June 2, 1969).

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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